NO. 82-531

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MORGAN WALTON PROPERTIES, INC., et al.,
Petitioners,

versus

INTERNATIONAL CITY BANK AND TRUST COMPANY, etc., and FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(Former Fifth Circuit Case)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether summary judgment under Rule 56, Federal Rules of Civil Procedure, was properly granted, holding that promissory notes were payable on demand, where the promissory notes were "payable on demand or two years after date," but a marginal notation on the promissory notes contained due dates two years after execution.

2. Whether promissory notes made in favor of a bank, later succeeded by the Federal Deposit Insurance Corporation, payable "demand or two years after date," but showing due dates of two years after execution, are demand notes or notes payable two years after execution.

PARTIES

This petition seeks review of two judgments of the United States Court of Appeals for the Fifth Circuit which were virtually identical or so closely related that a single petition for writ of certiorari is appropriate for both cases. Rule 19.4, Supreme Court Rules. The petitioners in the first case (Fifth Circuit Case No. 77-3255) are Morgan Walton Properties, Inc. and Florida Universal Financial Corporation, co-partners doing business as Grayton Dunes Properties, Morgan Walton Properties, Inc., Florida Universal Financial Corporation, Joseph F. Morgan, Johnnie Mae Morgan, Jerome W. Burkett and Joe A. Schaeffer, Jr. The petitioners in the second case (Fifth Circuit Case No. 77-3256) are Joseph F. Morgan and Johnnie Mae Morgan, husband and wife. The respondents in each case are International City Bank and Trust Company and Federal Deposit Insurance Corporation. International City Bank and Trust Company was held by ICB Corp.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MORGAN WALTON PROPERTIES, INC., et al.,
Petitioners,

v.

INTERNATIONAL CITY BANK AND TRUST COMPANY, etc., and FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

The petitioners, Morgan Walton Properties, Inc., et al., respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 10, 1982.

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* Former Fifth Circuit Case, Section 9(1) of Public Law 96-452, October 14, 1980.

OPINIONS BELOW

The opinions of the United States Court of Appeal, Fifth Circuit, are officially reported at 675 F.2d. 666 (App. A-1–A-8) and 675 F.2d. 669 (App. A-13). 1/ The memorandum decision and order of the United States District Court, Northern District of Florida, is unreported (App. A-18–A-24). Opinions collateral to this case, but unnecessary to the question presented for review, are reported at 612 F.2d. 227 and 404 So.2d 1059.

JURISDICTION

The judgments of the United States Court of Appeals were entered on May 10, 1982 and timely petitions for rehearing and rehearing *en banc* were denied on June 28, 1982 (App. A-9–A-10, A-14–A-15). This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Rule 56(a) - (c), Federal Rules of Civil Procedure, provides as follows:

> Rule 56. Summary Judgement
>
> (a) *For Claimant*. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20

1/ References to the record in the District Court are by designation "R" and to the appendix to this petition by designation "App.".

days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

An action was commenced in the United States District Court for the Northern District of Florida by respondent

International City Bank and Trust Company, a Louisiana banking corporation. The Federal Deposit Insurance Corporation was joined as a plaintiff in the District Court upon its appointment as receiver and transferee of the ownership of the assets of the International City Bank and Trust Company (R 1938-1939).

On December 27, 1974, the bank filed a complaint, based on diversity of citizenship, for foreclosure of certain real property located on the Gulf of Mexico in Walton County, Florida (R 1-56). The complaint alleged that the corporate petitioners herein executed and delivered in New Orleans, Louisiana, two promissory notes payable "demand or two years after date," one on December 29, 1973, in the principal sum of $4,550,000.00 and the other on April 25, 1974, in the principal sum of $2,143,000.00 (R 3-4). The individual petitioners were joined as guarantors (R 5-6). Petitioners filed an answer, affirmative defenses and counterclaims with several amendments thereto during the course of the litigation. In their initial answer petitioners admitted the execution and delivery of the promissory notes, but denied that the notes were "demand" notes, that any demand had been made or that they were in default on any obligations owed to the bank (R 75-76). The other defenses and counterclaims are not material to this petition.

Another promissory note was executed by petitioners Joseph F. Morgan and Johnnie Mae Morgan in the principal sum of $335,000.00 on January 11, 1974, payable "demand or two years after date."

Each of the three notes contained the following language "demand or two years after date, we . . . promise to pay . . . ." (R 8, 47). Typed in a space provided in the margin of the printed form notes, however, following the

printed word "DUE," were the dates "December 29, 1975," "April 25, 1976," and "1-11-76," respectively, representing two years from the date of execution of each note. One of the petitioners, Jerome W. Burkett, questioned the use of the word "demand" on the promissory notes but was assured by the bank that the use of this term was a mere formality (R 671). Relative to the bank's intent, its Vice President, John R. Sitton, Jr., who handled all of the transactions, acknowledged in an affidavit that the language "demand or two years" was used because it was a custom of the bank to place the word "demand" on its promissory notes, but that he had previously been advised by the bank's attorneys that a note containing that specific language would not be construed by a court to be a demand instrument (R 925). Mr. Sitton further testified on deposition that no payment of principal was expected before the end of two years from date of execution and that the loan was presented to the bank board for approval in that fashion (R 924). At the closing of each loan prepaid interest for two years was withheld (R 924-925).

Plaintiffs and defendants both moved for summary judgment in the District Court on the issue of whether the notes sued upon were "demand" notes or notes payable two years from the date of their execution. The District Court denied petitioners' motion for summary judgment and granted that of respondents, finding that the notes sued upon were demand notes, that there was no ambiguity in the notes to justify introduction of parol evidence as to their interpretation and that no demand was required before filing suit (App. A-18-24). The Court of Appeals agreed with each of the District Court's conclusions and held that summary judgment on the issue of whether the notes were payable on demand or two years after date of execution

was proper (App. A-1–A-7).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction of this cause in the District Court was based upon diversity of citizenship and the amount involved which was in excess of $10,000.00, exclusive of interest and costs. 28 U.S.C. 1332.

REASONS FOR GRANTING THE WRIT

This Court has long recognized that the purpose of the summary judgment procedure in contract actions is to prevent the use of frivolous defenses to cause vexatious delays in enforcement of the contract. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902). This Court also recognized in that case that summary judgment procedure should not be used to dispense with significant defenses and to deny the right of jury trial in an appropriate case.

Summary judgment procedure in its modern form requires that there be a complete absence of genuine issues of material fact and that the moving party be entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. The purpose of the Rule is not to deny litigants the right to trial by jury where there are appropriate issues to be tried. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620 (1944). We respectfully submit that the Court of Appeals, in affirming the summary judgment of the District Court, has interpreted Rule 56 in such a manner as to conflict with the applicable decisions of this Court interpreting the Rule and the decisions of other Court of Appeals. Rule 17, Supreme Court Rules.

In ruling on the motion for summary judgment with regard to whether the promissory notes were "demand" notes, the District Court was confronted with promissory notes "payable on demand or two years after date." Due dates were contained in the margin of the notes, however, which were clearly two years after their execution. Despite this obvious conflict on the face of the instrument, the District Court and Court of Appeals both concluded that the notes were clear and unambiguous, precluding the consideration of parol evidence as to the interpretation of the parties. Such a finding circumvents the true purpose of summary judgment procedure. While certainly summary judgment procedure is appropriate if the provisions of a written contract are unambiguous, such procedure is totally inappropriate unless the contract is "wholly unambiguous" and where only one fairly reasonable interpretation is indicated. *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975). The appropriate test to follow for summary judgment in contract cases was stated succinctly by the court in *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 169-170 (D. C. Cir. 1981):

> However the test for determining the clarity of contract terms is formulated, the core notion is clear: summary judgment on a contract is appropriate only when the relevant provisions are so straightforward that they can be read in but one way.

Where the intent of the parties is in fact unclear, parol evidence is admissable and relevant as an aid in construing the contract. *Davis v. Chevy Chase Financial Ltd., supra.*

In holding that the notes were clear and unambiguous, eliminating the consideration of parol evidence and support-

ing the summary judgment in favor of the bank, the court below relied upon a Louisiana state court decision, *Gulf States Finance Corp. v. Airline Auto Sales, Inc.*, 248 La. 591, 181 So.2d 36 (1965) and a decision of the Ninth Circuit Court of Appeals, *Bank of Nevada v. United States*, 251 F.2d 820 (9th Cir. 1957), *cert. denied*, 356 U.S. 938 (1958) (erroneously cited by the Court of Appeals as a Fifth Circuit case). The reliance by the Court below on these two cases contributed to its misinterpretation of the applicability of summary judgment to this case.

In *Gulf States Finance Corp. supra*, plaintiff brought suit on 50 demand notes given under an oral "floor planning agreement." Those notes were clearly demand notes in that there was no "qualifying language" in the notes such as the due dates contained in the marginal notations of the notes at bar. Defendants denied that formal demand for payment of the notes had been made before institution of suit. (In the present case it was admitted that no formal demand was made prior to bringing suit). Plaintiff's president supported the allegations of demand with an affidavit and a copy of a certified letter of notice of demand. The trial court entered summary judgment in favor of plaintiff. The Supreme Court of Louisiana reversed, holding (1) that defendants' specific denial of plaintiff's allegation that formal demand for payment of the notes had been made before suit created a genuine issue of material fact precluding summary judgment and (2) that parol evidence was proper to show a contemporaneous oral agreement by which the notes were not due until a later date.

The Louisiana Supreme Court noted that as between the parties to an instrument, a "grave injustice, resulting in irreparable injury to defendants" as would "perpetrate a fraud upon them" would occur if the court were not to

look outside the notes to the obligations under an oral agreement which induced them to execute the notes. *Gulf States Finance Corp., supra,* 181 So.2d 40. There is equally present at bar a set of circumstances whereby the conclusion is compelled that an issue of fact remained as to whether the notes were due on demand or within two years from the date of their execution.

The court below referred to *Bank of Nevada v. United States, supra,* as the most closely analogous case to the facts at bar. The court there pointed out, however, that a true demand note is payable immediately upon demand so that suit can be maintained at any time after delivery of the note with no other demand other than suit. The court went on to point out that if "there is something on the paper" to show a contrary intention of the parties, that rule does not apply. Clearly the marginal notation on each of the promissory notes sued upon in this case demonstrated "something on the paper" which created a genuine issue as to whether the notes were payable on demand or in two years.

Not considered below were a number of cases from other jurisdiction which have held that promissory notes containing language similar to that contained in the notes at bar are *not* demand notes and the holder is not entitled to bring an action thereon until the stated due date. E. g. *Whittier v. First National Bank,* 73 Colo. 153, 214 P. 536 (1923); *Brown v. Maguire's Real Estate Agency,* 101 S.W.2d 41 (Mo. 1937), *reversed on other grounds,* 121 S.W.2d 754; *Maffett v. Emmons,* 52 N.M. 115, 192 P.2d 557 (1948). Other courts have held that the marginal notation controls as to the due date of the note. E.g. *Baucom v. Friend,* 52 A.2d 123 (D.C. App. 1947); *Banking Commission v. Townsend,* 243 Wis. 329, 10 N.W.2d 110 (1943); *Nylander v. Nylander,*

268 N.W. 7 (Iowa 1936); *In re Feldman's Estate*, 387 Ill, 568, 56 N.E.2d 405 (1944).

Thus, it could hardly be said that the promissory notes were "wholly unambiguous" and that summary judgment was the appropriate procedure to resolve this conflict. Rather, parol evidence should have been considered by the District Court.

The parol evidence concerning the intention of the parties to the notes at the very least would have prevented the entry of summary judgment against the petitioners. That evidence includes the following facts: (1) The Vice President of the bank stated that no payment of principal was expected for two years. (2) The petitioners questioned the use of the word "demand" before execution but were assured by the Vice President of the bank this was a mere formality. (3) The Vice President of the bank stated that the language "demand or a certain number of years" was used as a custom of the bank but without legal effect. (4) The loans were presented to the bank board as two years loans. (5) Interest was prepaid at the closing for each note for a full two years. Concerning the latter fact, a number of courts have held that the prepayment of interest for a certain term is deemed to extend the due date on a note through the end of the period for which interest has been prepaid. *Rogers v. Public Service Employees Credit Union*, 112 S.W.2d 258 (Tex. App. 1937); *Walley v. Desert National Bank*, 14 Utah 305, 47 P. 147 (1896); *Ardmore State Bank v. Lee*, 61 Okla. 169, 159 P. 903 (1916).

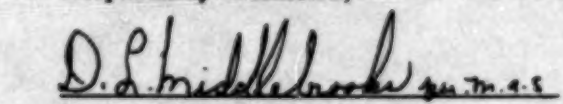
The United States Court of Appeals below should have reviewed the District Court's summary judgment under the principle that the respondents had the burden of establishing

"that there [was] not the slightest doubt as to the facts" involved. *Insurance Company of No. America v. Bosworth Construction Co.*, 469 F. 2d 1266, 1268 (5th Cir. 1972). In affirming the summary judgment, the court below violated the letter of Rule 56, as well as its spirit, justifying the grant of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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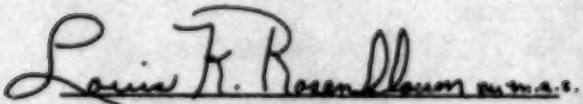

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